Office Supreme Court, U.S.
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NOV 20 1984
ALEXANDER L. STEVAS,
CLERK

No. 84-385

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

HONDA MOTOR CO., LTD.,
Petitioner,

v.

WALTER P. COONS,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of New Jersey

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PETITIONER'S REPLY BRIEF

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November 20, 1984

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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PETITIONER'S REPLY BRIEF *

1. *Coons II Creates a New and Independent Violation of the Commerce Clause.* Honda's petition demonstrated that because the prospectivity ordered in *Coons II* severely undermines the Commerce Clause interests recognized in *Coons I* and subjects constitutionally protected conduct to punishment, this Court's decisions in *Lemon* v. *Kurtzman*, 411 U.S. 192, 201-03 (1973) (*Lemon II*), *New York* v. *Cathedral Academy*, 434 U.S. 125, 129-34 (1977), and *United States* v. *U.S. Coin & Currency*, 401 U.S. 715, 723-24 (1971), mandate that "a rule of complete retroactivity"—rather than a balancing test of the sort set forth in *Chevron Oil Co.* v. *Huson*, 404 U.S. 97, 106-07 (1971)—must control. Pet. at 12-18. Neither respondent Coons nor the Attorney General of New Jersey adequately answers Honda's argument. Respondent Coons' response is to cite the Attorney General's brief. Coons' Opp. at 16 n.12. The Attorney General, in turn, attempts to answer Honda's point by mischaracterizing it. He states that Honda's position is that "a *per se* rule of retroactivity should be applied where a state civil statute is held unconstitutional," and that this conclusion is "incorrect." A.G. Opp. at 15-16.

Honda's position is not—contrary to the Attorney General's characterization—that every time a state statute is held unconstitutional, the decision must be retroactive. Rather, the point is that a state or federal court may not, as the New Jersey Supreme Court did in *Coons II*, apply a constitutional decision only prospectively without any concern for the impact on constitutional rights. Instead, the effect on constitutional interests must be assessed, and when, as here, non-retroactivity would lead to a new and independent constitutional violation, a rule of complete retroactivity must govern.

Coons I held, relying on a long line of decisions of this Court, that the Commerce Clause did not permit New Jersey to deny its statutes of limitation to non-New Jer-

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* Honda's Rule 28.1 statement appears at p. ii of its Petition for Certiorari.

sey corporations solely because those corporations had not registered to do business in the state. App. 38a-40a. Under the prospectivity ruling in *Coons II*, this unconstitutional discrimination against non-New Jersey corporations will continue in every case currently pending in New Jersey, in every future personal injury case which is filed prior to August 3, 1985, and in every future contract case which is filed prior to August 3, 1989. Pet. at 4-5. As both respondents acknowledge, hundreds of cases in both New Jersey state and federal courts will be affected, Coons' Opp. at 14 n.9; A.G. Opp. at 10-11; and numerous non-New Jersey corporations will be penalized for years in the future simply for exercising their constitutional right not to register to do business in New Jersey.

This Court recognized in *Lemon II* and *Cathedral Academy* that a constitutional decision may not be applied non-retroactively if to do so would "substantially undermine the constitutional interests at stake," or present more than a "remote possibility of constitutional harm," or result in a "new and independently significant infringement" of constitutional guarantees. *Lemon II*, 411 U.S. at 201-03; *Cathedral Academy*, 434 U.S. at 134. Similarly, in *U.S. Coin*, this Court held that "a rule of complete retroactivity" must control if non-retroactivity would punish conduct "that cannot constitutionally be punished in the first instance." 401 U.S. at 723-24. In this case, not only does the prospectivity ordered in *Coons II* "substantially undermine" the Commerce Clause interest recognized in *Coons I* and present more than a "remote possibility" of constitutional harm, the decision in *Coons II* creates a significant violation of the Commerce Clause; it countenances an acknowledged unconstitutional discrimination which permits non-New Jersey corporations, as well as state and federal courts, to be burdened with stale claims for years in the future. So too, the prospectivity ordered in *Coons II* means that Honda and similar non-New Jersey corporations will be penalized for years for conduct which "cannot constitutionally be punished"—that is, for exercising their right

under the Commerce Clause not to register to do business in New Jersey. The principles set forth in *Lemon II*, *Cathedral Academy*, and *U.S. Coin* mandate that when non-retroactivity will so undermine constitutionally protected interests, retroactivity must be the rule.

This analysis cannot be answered—as respondent Coons attempts, Coons' Opp. at 8-9—by merely repeating the statement from *Great Northern Railway Co.* v. *Sunburst Oil & Refining Co.*, 287 U.S. 358, 364 (1932), that "the federal constitution has no voice upon the subject" of retroactivity. The issue in *Sunburst* was whether a state court violated the federal constitution by applying a state statutory decision only prospectively. 287 U.S. at 361. *Sunburst* does not mean that constitutional decisions may be applied only prospectively without regard for constitutional interests. As this Court recognized in *Lemon II*, "*Sunburst* does not, of course, suggest that we may ignore constitutional interests in deciding whether to attach retrospective effect to a constitutional decision of this Court." 411 U.S. at 200 n.2.

It is also no answer to suggest that the recent amendment to the tolling statute has "cured" the constitutional problem. A.G. Opp. at 13.[1] Even assuming that the amended statute is constitutional,[2] it has, in fact, enhanced, rather than diminished, the constitutional problem created by *Coons II*. The amended statute has had no effect on pending cases; in all such cases, *Coons II* prevents non-New Jersey corporations from asserting a statute of limitations defense. What the amendment has done, however, is to extend further the time during which non-New Jersey corporations are not able to assert state statutes of limitation. Under *Coons II*, a non-New Jersey corporation could assert a statute of limitations defense in

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[1] The amendment to New Jersey's tolling statute is reprinted at page 1a of respondent Coons' Cross-Petition and Appendix for a Writ of Certiorari (No. 84-591).

[2] As explained at p. 13 n.6 of Honda's Opposition to respondent Coons' Cross-Petition, the new tolling statute may itself violate the Commerce Clause.

a personal injury action filed after *August 3, 1985*, and in a contract action filed after *August 3, 1989*; under the amended statute, even a foreign corporation which designated an agent in New Jersey the day the amendment was adopted will not be able to assert a limitations defense in personal injury cases filed prior to *August 23, 1986*, or in contract cases filed prior to August *23, 1990*. Rather than eliminating the constitutional violation created by *Coons II*, then, the amendment to the tolling statute has continued for at least one additional year the unconstitutional discrimination against non-New Jersey corporations created by *Coons II*. Thus, the ultimate effect of the statutory amendment is to magnify, rather than "cure," the unconstitutionality of *Coons II*.[3]

2. *The New Jersey Supreme Court Relied on State Law in Coons II.* In the third paragraph of *Coons II*, the court stated: "We now hold *as a matter of state law* that *Coons I* is to be applied prospectively only . . . ." App. 4a (emphasis added). This application of state law by a state court to determine the retroactivity of a federal constitutional decision has broad constitutional significance which merits this Court's attention. Indeed, both respondent Coons and the Attorney General appear to concede that because *Coons I* involves a federal constitutional right, its retroactivity must be governed by federal law, Pet. at 10-11; neither argues that issue. Instead, both attempt to get around the clear reliance in *Coons II* on state law by arguing that *Coons II* borrowed enough principles from the federal retroactivity cases that the decision, in effect,

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[3] Both respondent Coons and the Attorney General acknowledge that the amendment has extended by at least one year the period in which New Jersey residents may sue foreign corporations on stale claims without a statute of limitations bar. Respondent Coons explains that the amendment continues "without interruption" the "procedural remedy" of tolling against non-New Jersey corporations. Coons' Opp. at 4 n.3. The Attorney General states that the amendment and *Coons II* work together to "retain the tolling effect for most causes of action involving foreign, unrepresented corporate defendants without any gap." A.G. Opp. at 14 n.*.

applied federal law. Thus, respondent Coons argues that the *Coons II* court applied retroactivity principles "drawn from" both federal and state decisions, Coons' Opp. at 6-7, and that, while *Coons II* made "ample and appropriate reference to state precedent," the "heart" of the ruling is federal law. Coons' Opp. at 17.

In deciding whether to apply a federal constitutional decision non-retroactively, however, a state court must do more than "draw from" federal decisions; it must *apply* federal law, as both state and federal cases uniformly hold. Pet. at 10-11. In *Coons II*, in contrast, the New Jersey court not only stated that it reached its decision "as a matter of state law," it picked and chose among state and federal law principles, applying some and rejecting others. In the end, the decision in *Coons II* was the result of a hodgepodge "balancing" test, which was formulated by the New Jersey court, which took no account of constitutional concerns, and which is inconsistent with federal retroactivity principles.

The decision in *Coons II* could hardly have been more explicit in its reliance on state law. New Jersey cases are cited predominantly; the court speaks of the approaches to retroactivity "that have emerged from *our* case law." App. 7a (emphasis added). Although federal cases are cited, they are discussed only in conjunction with New Jersey decisions. For example, the New Jersey court states that its prospectivity ruling is based on "principles drawn from *our own state decisions* as well as from United States Supreme Court cases," and that "[t]he development of New Jersey's retroactivity law has proceeded on a track *roughly* paralleling that represented by the [federal law] cases discussed above." App. 7a, 11a (emphasis added).

The result in *Coons II* can also not be reconciled with federal retroactivity principles. While the *Coons II* court cited and discussed parts of *Lemon II*, the *Coons II* court wholly ignored the principles set forth in *Lemon II*, as

well as *Cathedral Academy* and *U.S. Coin.* As explained above, these decisions mandate that constitutional decisions may not be applied only prospectively if prospectivity would "substantially undermine" constitutional interests, present more than a "remote possibility" of constitutional harm, or subject constitutionally protected conduct to punishment. The result of *Coons II*, therefore, as well as the language, shows that state retroactivity principles controlled.

Moreover, even if the equitable balancing test set forth in *Chevron Oil* were the proper standard for deciding the retroactivity of *Coons I*, the court in *Coons II* did not correctly apply *Chevron.* As noted in Honda's petition (at 19), the *Coons II* court openly admitted that *Coons I* did not satisfy *Chevron*'s "threshold" "clear break" test for prospectivity.[4] *Coons II* also misapplied other *Chevron* principles. *Coons II* paid scant attention to the impact of prospectivity on the purpose of the *Coons I* rule, *i.e*, the termination of unconstitutional discrimination against and burdens on non-New Jersey corporations. *Coons II* also merely "presumed" that there had been actual reliance on the tolling statute, App. 17a, even though evidence of actual reliance has generally been deemed "fundamental" by the federal courts to prospectivity. Corr, *Retroactivity: A Study in Supreme Court Doctrine "As Applied,"* 61 N.C.L. Rev. 745, 773 (1983). Indeed, neither respond-

[4] Respondent Coons contends that any argument that *Chevron* includes a "threshold" "clear break" test is "totally misplaced." Coons' Opp. at 7. He thus ignores the explicit statement by this Court in *United States* v. *Johnson*, 457 U.S. 537, 550 n.12 (1982), that the initial *Chevron* test seeks to determine whether a decision was a "clear break" with past law, and that this "clear break" test is a "threshold" requirement for holding a civil decision nonretroactive. And, in reprinting the quote from *Johnson* that "all questions of civil retroactivity continue to be governed by the standard enunciated in *Chevron*," Coons' Opp. at 7, respondent Coons leaves out the cross-reference in that the quote to the earlier portion of *Johnson* which explained *Chevron*'s "threshold" "clear break" requirement. See Pet. at 19 & n.13.

ent Coons nor the Attorney General have to date produced *any* evidence of actual reliance by New Jersey plaintiffs on the tolling statute. In his brief to this Court, the Attorney General echoes the presumption of reliance made by the *Coons II* court, stating that "there *may* exist *potential* plaintiffs" who postponed suit in reliance on the tolling statute. A.G. Opp. at 10 (emphasis added). Respondent Coons also makes no attempt to show actual reliance on the statute; he obviously would be hard-pressed to do so, since the fact that he sued both Honda and American Honda—a registered New Jersey corporation—at the same time shows that he placed no reliance whatever on the tolling statute.[5]

The conclusion is inescapable that rather than applying the balancing test outlined in *Chevron*, the *Coons II* court drew on a hodgepodge of "equitable" principles and used that mix of principles to create a state-law balancing test far removed from the test outlined in *Chevron*. Under the balancing test applied by the New Jersey court in *Coons II*, a decision may be applied prospectively even if it does not constitute a clear break with past law, even if prospectivity severely undermines the purposes of the decision, and even if there was no justifiable or actual reliance on a prior rule. This peculiar "balancing" test is not a proper application of *Chevron*.

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[5] Instead of responding to Honda's point concerning the absence of actual reliance, respondent Coons argues that, if retroactive, *Coons I* would "effectively shorten[] the applicable statute of limitations," and unconstitutionally deprive him of a "fair and reasonable opportunity" to adjust to a new limitations period. Coons' Opp. at 13 & n.8. But for personal injury actions such as respondent Coons', the limitations period has always been two years, N.J. Stat. Ann. § 2A:14-2 (West 1952); and the New Jersey courts have already determined that respondent Coons did not sue on his claim in a timely fashion. App. 65a-68a. If *Coons I* were retroactive, respondent Coons and similarly-situated plaintiffs would thus be deprived only of the chance to litigate claims against non-New Jersey corporations which they cannot bring against New Jersey corporations because of the statute of limitations bar.

If this Court allows *Coons II* to stand, it will be sending a message to state courts that they are free to create and apply their own mix of "equitable" factors to decide whether a federal constitutional decision will be retroactive. The retroactivity of federal constitutional decisions, however, should not be left to the unfettered discretion of state courts, with differing decisions based on a particular court's determination of the mixture of governing rules. Not only would such a result be in conflict with an unbroken line of precedents of this Court and of other state courts of last resort, Pet. at 10-11, it would be inconsistent with a judicial system where the federal courts are the ultimate protectors of federal constitutional rights. By granting certiorari, this Court can fulfill its responsibility for ensuring the proper implementation of federal constitutional guarantees.[6]

3. *The Amendment of the Tolling Statute Does Not Make this Case of "Isolated Significance."* Quoting from *Rice* v. *Sioux City Cemetery*, 349 U.S. 70, 76-77 (1954), respondent Coons implies that the amendment of the tolling statute last August makes this case of "isolated significance," lacking in public importance, and hence unworthy of this Court's review. Coons' Opp. at 15-17. This is untrue. There are hundreds of cases pending in New Jersey state and federal courts potentially affected by *Coons II*;

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[6] The Attorney General suggests that this Court's decision in *Bacchus Imports, Ltd.* v. *Dias*, 52 U.S.L.W. 4979, 4983 (U.S., June 29, 1984), shows that this Court has granted state courts a "large measure of discretion" and "wide latitude" in formulating an "appropriate remedy" when a state statute has been overturned on federal constitutional grounds. A.G. Opp. at 19. The Attorney General misreads *Bacchus*. While this Court remanded *Bacchus* to the state court after holding a state statute unconstitutional, it did not leave the remedy for that constitutional violation wholly in the unfettered discretion of the state court. Instead, the purpose of the remand was to allow the state court to resolve certain "intertwined" state law issues, and to develop "more of a record." This Court did not state that it was abdicating responsibility for the remedy issue entirely, only that it was reluctant to address that issue "in the first instance." *Id.*

as pointed out in Honda's petition, *amicus* Brinco Mining Limited alone indicated to the New Jersey court that a significant number of the six hundred cases pending against it in New Jersey may be barred but for *Coons II*, and in federal court alone, 60 motions for summary judgment on the statute of limitations are pending. Pet. at 17 & n.12. If *Coons II* is allowed to stand, these and other cases will proceed to judgment solely against non-New Jersey corporations, while New Jersey corporations will be dismissed on statute of limitations grounds. The amended statute will have no effect on these pending cases.[7] Moreover, as explained in Point 1 above, the amended statute extends for at least one additional year the continuing constitutional violation created by *Coons II*; it thus magnifies, rather than diminishes, the constitutional problem, since many more otherwise barred claims may be filed in New Jersey state and federal courts during the extra time afforded by the amended statute. In addition to the impact on pending and future New Jersey cases, the question presented by *Coons II*—whether a state court may formulate its own state-law "balancing" test to determine the retroactivity of federal constitutional decisions—is of general constitutional significance, and merits this Court's consideration.

4. *Respondent Coons Is Not the "Champion of the Cause."* Respondent Coons answers the final point presented in Honda's petition—that, under federal law, Honda and the corporate *amici* who obtained the constitutional decision in *Coons I* are entitled to the benefits of that ruling, Pet. at 25-26—by arguing that he,

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[7] It should also be stressed that most of the hundreds of cases affected by *Coons II* do not involve situations where the plaintiff missed the limitations period by only a few days. Respondent Coons missed the statute of limitations by two years. App. 65a-68a. Many of the cases pending against *amicus* Brinco Mining Limited involve plaintiffs who missed the statute by even longer periods. Further complicating the stale claims problem faced by Brinco is that the suits against it usually involve incidents from the 1950s; the longer the limitations period is tolled, the greater this problem of stale claims becomes.

rather than Honda, is the "champion" of the prospectivity ruling in *Coons II*, and therefore entitled to the benefits of that decision. Thus, Mr. Coons contends, "the decision of the majority in *Coons II* is totally consistent with the general rule that those who champion the cause should benefit by their efforts." Coons' Opp. at 14. This argument has no support in federal retroactivity principles. When, as here, a decision has been held prospective, there is necessarily one litigant who has obtained the ruling on the merits and another who is responsible for the holding of prospectivity. If, as respondent Coons asserts, the party responsible for the prospectivity ruling should be rewarded, in any case where a decision is held prospective the litigant who obtained the decision on the merits would not benefit by the ruling it obtained. Litigants would thus have no incentive to challenge outmoded doctrines or unconstitutional statutes. In fact, however, the federal rule has always been the opposite; the party responsible for correcting the underlying law has received the fruits of its effort. Pet. at 25. Here, too, Honda and its *amici* should receive the benefits of the constitutional ruling they obtained in *Coons I*.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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